No. 14-86

In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

ABERCROMBIE & FITCH STORES, INC.,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE STATES OF ARIZONA, HAWAI'I, ILLINOIS, MARYLAND, MONTANA, NEW HAMPSHIRE, NEW YORK, OREGON, AND WASHINGTON AS *AMICI CURIAE* SUPPORTING PETITIONER

Thomas C. Horne
Attorney General of Arizona
Robert L. Ellman
Solicitor General
Rose Daly-Rooney*
Chris Carlsen
Assistant Attorneys General
400 West Congress, Bldg. S-315
Tucson, AZ 85701
Phone (520) 628-6756
Rose.Daly-Rooney@azag.gov
**Counsel of Record*

Counsel for Amici Curiae States

(additional counsel listed on signature pages)

Becker Gallagher · Cincinnati, OH Washington, D.C. 800.890.5001

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INTEREST OF *AMICI CURIAE*

Amici Curiae, the States of Arizona, Hawai'i, Illinois, Maryland, Montana, New Hampshire, New York, Oregon, and Washington (the "*Amici* States") have a strong interest in effective enforcement of Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17, and of state anti-discrimination laws that parallel Title VII. To avoid unnecessary duplication of efforts and provide for the prompt resolution of employment discrimination charges, the EEOC enters into worksharing agreements with state and local agencies. 42 U.S.C. § 2000e-8(b); *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 122 (1988) (noting that Title VII supports worksharing agreements to avoid "unnecessary duplication of effort or waste of time"). State and local agencies must meet standards of capability, performance, and compatibility with EEOC's charge processing systems and methods to be designated as Fair Employment Practice Agencies ("FEPAs"). 29 C.F.R. § 1601.70. The EEOC and FEPAs work together to investigate and litigate charges of discrimination.[1]

The Arizona Civil Rights Division ("ACRD"), Hawai'i Department of Labor and Industrial Relations, Montana Human Rights Division, Oregon Bureau of Labor, and Washington Human Rights Commission are designated FEPAs. 29 C.F.R. § 1601.74 (listing designated FEPAs that include forty-six state agencies as well as many city agencies). States that are not

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[1] *See, e.g., Harassment Charges, EEOC and FEPA Combined: FY 1997 - FY 2011*, http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm (last visited Dec. 1, 2014).

designated as a FEPA also have a strong interest because they have standing to sue to enforce Title VII rights on behalf of its citizens under the parens patriae doctrine. *See EEOC v. Fed. Express Corp.*, 268 F. Supp. 2d 192, 197-98 (E.D.N.Y. 2003) (In Title VII action involving right of employees to wear dreadlocks for religious reasons, court held that New York Attorney General's Office had standing to sue under Title VII because standing provision evinces intention on part of Congress to allow States to sue in their parens patriae capacity).

The ACRD enforces the Arizona Civil Rights Act ("ACRA"), which has numerous provisions that parallel Title VII provisions. *See* Ariz. Rev. Stat. §§ 41-1461 to 1465. Similar to the provisions of Title VII, under ACRA it is an unlawful employment practice "(t)o fail or refuse to hire or to discharge any individual because of the individual's religion." Ariz. Rev. Stat. § 41-1463(B)(1); *see also* Ariz. Rev. Stat. § 41-1461(13) (defining religion to include religious practices that may be accommodated without undue hardship). Other *Amici* States have laws that parallel Title VII's prohibition against religious discrimination. *See, e.g.*, Mont. Admin. R. 24.9.608 (requiring a reasonable accommodation for religious beliefs and practices); Or. Rev. Stat. Ann. § 659A.033 (making it unlawful to impose an occupational requirement that restricts the ability of an employee to wear religious clothing in accordance with the employee's sincerely held religious beliefs unless it would be pose an undue hardship to accommodate the individual). Although several differences exist, the ACRA is "generally identical" to Title VII, and therefore Title VII case law can be persuasive in interpreting portions of the ACRA. *Bodett*

v. Cox Commc'n Inc., 366 F.3d 736, 742 (9th Cir. 2004) (quoting *Higdon v. Evergreen Int'l Airlines, Inc.*, 673 P.2d 907, 909-10 n.3 (Ariz. 1983)). Therefore, the *Amici* States have an interest in how federal courts interpret similar provisions of state civil rights laws that have not been interpreted by state courts.

Arizona has a particular interest in the resolution of this case because Arizona has a large Native American population,[2] which suffers high levels of unemployment and requires "strong application of antidiscrimination laws" to combat a "painful legacy of discrimination." *Remarks by the President on Economic Mobility*, 2013 WL 6252544 at 5 (Dec. 4, 2013). Further, groups within that population adhere to religious-based grooming customs that may conflict with hair-length and other aesthetic policies similar to Abercrombie's "Look Policy." *See, e.g., A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248 (5th Cir. 2010) (affirming district court's decision enjoining school district's requirement that a Native American boy wear his long hair in a bun on top of his head or in a braid tucked into his shirt because it offended a sincerely held religious belief violating the Texas Religious Freedom Restoration Act); *Adakai v. Front Row Seat, Inc.*, 125 F.3d 861 (10th Cir. 1997)

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[2] Arizona, Montana, Oregon and Washington are estimated to be comprised of an "American Indian and Alaska Native" population of 5.3%, 6.5%, 1.8%, and 1.9%, respectively (versus a national average of 1.2%). U.S. Census Bureau, *State and County QuickFacts*, http://quickfacts.census.gov/qfd/states/index.html (last visited Dec. 2, 2014). Hawai'i is estimated to be comprised of a "native Hawaiian and Other Pacific Islander" population of 10%. *Id.*

(affirming jury verdict in favor of Native American plaintiff who was fired because he refused to cut his long hair, which was an integral part of his heritage).

Because the *Amici* States work with the EEOC to eliminate religious discrimination in the workplace and have state provisions that parallel Title VII, the *Amici* States have a compelling interest in having this Court adopt a flexible, workable standard for determining when employers may be liable for failure to provide religious accommodations. The Tenth Circuit's ruling does not provide a workable standard; instead it allows the employer to discriminate when the applicant does not know of an employer's policy and the employer assumes that the applicant's religious beliefs will conflict with its policy.

SUMMARY OF ARGUMENT

A divided panel of the Tenth Circuit incorrectly held that employment applicants are not entitled to a religious accommodation unless they inform the employer that their religious beliefs conflict with the employer's policies, regardless of whether they have knowledge of the employer's policies. *EEOC v. Abercrombie & Fitch Stores, Inc.*, 731 F.3d 1106, 1134-35 (10th Cir. 2013). Relying on cases that did not raise or resolve whether it is the applicant's burden in the first instance to request a religious accommodation to an undisclosed employer policy, the Tenth Circuit's analysis treats applicants and employees as interchangeable despite that applicants do not have access to an employer's policies or the manner in which those policies are applied. In cases where an employer has superior knowledge of a potential conflict between an applicant's religious beliefs and its own undisclosed

policies that will be used to screen an applicant during hiring, an employer should engage in an interactive dialogue with the applicant about whether a reasonable accommodation is possible. By not mentioning the possible conflict and then not hiring the applicant because of it, employers can affirmatively avoid their Title VII obligations to provide a religious accommodation.

In contrast to the Tenth Circuit's inflexible standard, the Ninth Circuit held that an employee was not required to provide his employer with explicit, direct knowledge of the religious nature of the ceremony he wished to attend, because "[a] sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirement." *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439 (9th Cir. 1993). Under this standard, once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices. At that point, the need for accommodation has been put on the table for discussion and the employer, with superior knowledge of its ability to accommodate, can no longer ignore the need to initiate dialogue with the employee regarding reasonable accommodations.

The *Heller* standard, unlike the Tenth Circuit's holding, is flexible enough to avoid (1) reflexively granting an employer summary disposition of an

applicant's religious accommodation claim when an employer has superior knowledge of a conflict or potential conflict between the applicant's religious beliefs and its workplace requirements, (2) treating employees and applicants the same despite the asymmetry in information generally available to employees that is not available to applicants, and (3) allowing an employer to escape liability for failing to make a reasonable accommodation simply by refusing to engage in an interactive dialogue with an applicant about a potential conflict.

Contrary to the Tenth Circuit's reasoning, a more flexible notice requirement will not require employers to make assumptions about religion or ask pre-employment inquiries about religious beliefs. Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111 to 12117, provides a model to guide employers in formulating lawful questions during the hiring process about whether applicants can meet job requirements with or without reasonable accommodation and how to avoid improper inquiries and unlawful assumptions.

A flexible rule, as enunciated in *Heller*, would not encumber employers by requiring that they review a laundry list of employment practices with every applicant because, in reality, notice of conflicts between sincerely held religious beliefs and workplace requirements do not often emerge until after employment begins. And the trigger for engaging in an interactive dialogue about reasonable accommodation is not initiated until a potential conflict exists. Employers need only provide sufficient notice of their policies, such as dress and grooming standards, when

employers know or should know that an applicant's religious beliefs will conflict with their policy and use the policy to screen out the applicant.

ARGUMENT

I. The Tenth Circuit's Explicit, Direct Notice Requirement Should Not Apply When the Employer Knows or Should Know There Is a Potential Conflict Between an Applicant's Religious Beliefs and Their Employment Policies.

The Tenth Circuit held that an applicant for employment, Samantha Elauf, was not entitled to protection from religious discrimination because she did not inform the employer that her religious beliefs conflict with the employer's policies, regardless of whether she had knowledge of the employer's policies. *Abercrombie*, 731 F.3d at 1134-35. The Tenth Circuit reached this conclusion by finding that applicants must bear the same prima facie burden for proving religious discrimination as employees, and applicants must "inform (their) employer" of any potential conflict before discrimination can be shown. *Id.* at 1122.

However, as Judge Ebel points out, applicants and employees are not similar because applicants do not have necessarily have access to an employer's policies or the manner in which those policies are applied. *Id.* at 1150 (Ebel, J., concurring in part and dissenting in part). Employees, not applicants, receive employee manuals and training that set out the employer's policies, such as dress and grooming standards, the list of observed holidays, leave policies, break policies, the benefits and privileges of employment, and the internal

grievance procedures for requesting a reasonable accommodation or making a complaint of discrimination. Often, an employer's policies and manuals are proprietary and confidential. Employees, not applicants, have the opportunity to be in the workplace where they can observe whether co-workers have religious decorations in their offices and whether the menu items for company cafeterias or events include options for dietary restrictions related to religious beliefs. Employees, not applicants, are assigned job duties, issued work schedules, and disciplined for failing to satisfy unwritten work requirements.

Here, Abercrombie's "superior knowledge" of their own policies created a situation where Abercrombie was "able affirmatively to avoid its obligation to engage in an interactive dialogue with Elauf about a reasonable accommodation of Elauf's religious practice by not mentioning the possible conflict and then not hiring her because of it." *Id.* Because an applicant necessarily has inferior knowledge of an employer's policies, the Tenth Circuit's prima facie test allows employers to engage in religious discrimination unless the applicant uses the interview as an opportunity to recite a laundry list of the religious practices to which the applicant adheres.[3] Ironically, the Tenth Circuit criticized the EEOC's argument because it determined that Title VII did not require employers to enter the interview "recounting a laundry list of all of the

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[3] This would inject the issue of religion into the hiring decision in cases where there is no conflict or even potential conflict between the employer's policies and the applicant's beliefs.

practices that employees cannot do in the workplace." *Abercrombie*, 731 F.3d at 1130 n.11.

The Tenth Circuit's majority conflates employees and applicants and treats them as interchangeable. By doing this, the majority ascribes a level of knowledge to applicants that is generally available only to employees – who have access to the employer's policies, training in the employer's policies, and specific knowledge of the practical effects of the employer's policies – and then simply assumes that applicants have the same ability as employees to determine whether a conflict exists.

The error of this assumption is borne out by the cases that underpin the prima facie requirement for employees to "inform" the employer of a religious conflict. With one inapposite exception,[4] that requirement arises from a line of cases that only examine the steps that *employees* must take to inform employers of religious conflicts that are apparent to the employee. *See Chrysler Corp. v. Mann*, 561 F.2d 1282, 1286 (8th Cir. 1977) (determining that an employee "may forego the right to have his beliefs accommodated by his employer" when that employee not only had superior knowledge of the conflict, but was "disinterested in informing his employer of his religious needs" and did "not attempt to accommodate his own beliefs through the means already available to him or cooperate with his employer in its conciliatory efforts"); *see also Thomas v. Nat'l Ass'n of Letter Carriers*, 225 F.3d 1149, 1155 (10th Cir. 2000) (granting summary judgment to employer on employee's religious

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[4] *See Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1484 (10th Cir. 1989).

accommodation claim where employer provided numerous reasonable accommodations to address the employee's request for Saturdays off to observe the Sabbath); *Turpen v. Missouri-Kansas-Texas R.R. Co.*, 736 F.2d 1022, 1026, 1028 (5th Cir. 1984) (concluding there was no clear error in finding that railroad, charged with religious discrimination in employment, made a good-faith effort to accommodate an employee whose Sabbath was from sundown Friday to sundown Saturday and who was discharged when he failed to work during that period); *Brener v. Diagnostic Ctr. Hosp.*, 671 F.2d 141, 147 (5th Cir. 1982) (finding no clear error in determination that employer tried to accommodate employee and requiring the employer to force further shift trades between the staff pharmacists would produce undue hardship); *Brown v. Gen. Motors Corp.*, 601 F.2d 956, 959-60 (8th Cir. 1979) (employer failed to establish that it would have posed an undue hardship to have granted Saturdays off for an employee to observe the Sabbath).

Nor did the courts in *Thomas*, *Turpen*, *Brener*, or *Brown* analyze the notice requirement, because the fact that the employees had provided notice was uncontested in each case. *Thomas*, 225 F.3d at 1153-54 (undisputed that plaintiff-employee had made five specific accommodation requests); *Turpen*, 736 F.2d at 1026 (uncontested that the employee had met his burden of establishing the prima facie case); *Brener*, 671 F.2d at 144 (same); *Brown*, 601 F.2d at 959 (same).

One of the cases underpinning the Tenth Circuit's decision addresses an applicant's religious accommodation claim, but it is inapposite here. *Toledo*, 892 F.2d at 1484. In *Toledo*, the employer, Nobel,

communicated to applicants in both the newspaper advertisements for the position and in information sent to applicants before interviews of its policy not to hire drivers who had used illegal drugs within two years of the date of their application. *Id.* The employer interviewed plaintiff and told him that he had the necessary experience for the job and would be hired if he passed four tests routinely given to all of Nobel's driver applicants, including a polygraph to determine an applicant's truthfulness in responding to questions about past illegal drug use. *Id.* This notice of the employer's policy and pre-employment tests informed the plaintiff of a conflict and triggered the applicant's initiation of the interactive dialogue. *Id.*

In contrast to the *Toledo* facts, here "the EEOC set forth evidence from which a jury could find that Abercrombie refused to hire Elauf, without ever informing her that wearing a hijab conflicted with Abercrombie's Look Policy, in order to avoid having to discuss the possibility of reasonably accommodating Elauf's religious practice." *Abercrombie*, 731 F.3d at 1143 (Ebel, J., concurring in part and dissenting in part). The employer's superior knowledge of a potential conflict that the employer withheld from the applicant is at the heart of this dispute.

Although only *Toledo* states, without analysis, that the prima facie requirement to "inform" is expected of applicants as well as employees, the Tenth Circuit expands the requirement without reflection to encompass applicants, stating that "we are not convinced that we are at liberty to disregard the plain terms of our *Toledo* and *Thomas* decisions, which place the prima facie burden on the plaintiff to establish that

the applicant or employee has initially informed the employer of the conflicting religious practice and the need for an accommodation." *Abercrombie*, 731 F.3d at 1125. Again, this expansion of the prima facie burden placed on employees to applicants is not justified by precedent, and shields employers from liability for discriminatory practices by unrealistically requiring applicants to intuit the manner in which their religious practices may conflict with policies that are not available to them.

The information asymmetry between applicants and employers[5] is best addressed by adopting the flexible notice requirement employed by the Eighth, Ninth, and Eleventh Circuits. *See Brown v. Polk Cnty., Iowa*, 61 F.3d 650, 654 (8th Cir. 1995); *Heller*, 8 F.3d 1433; *Dixon v. Hallmark Cos.*, 627 F.3d 849, 856 (11th Cir. 2010); *Hellinger v. Eckerd Corp.*, 67 F. Supp. 2d 1359 (S.D. Fla. 1999). In *Heller*, the Ninth Circuit held that an employee was not required to provide his employer with explicit and direct knowledge of the religious nature of the ceremony he wished to attend, because "[a] sensible approach would require only enough information about an employee's religious needs to permit the employer to understand the existence of a conflict between the employee's religious practices and the employer's job requirement." *Heller*, 8 F.3d. at 1439.

Although *Heller* did not raise or resolve whether it is the applicant's burden in the first instance to request

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[5] Except where employers provide notice of the selection criteria or test that will be applied to eliminate prospective applicants. *See, e.g., Toledo*, 892 F.2d at 1484.

a religious accommodation to an undisclosed employer policy used as a selection criteria, the *Heller* standard, unlike the Tenth Circuit standard, is flexible enough to avoid (1) reflexively granting an employer summary disposition of an applicant's religious accommodation claim when an employer has superior knowledge of a conflict or potential conflict between the applicant's religious beliefs and its workplace requirements, (2) treating employees and applicants the same despite the asymmetry in information generally available to employees that is not available to applicants, and (3) allowing an employer to escape liability by failing to engage in the interactive dialogue with an applicant about a perceived religious conflict.[6] As the dissent noted below, the principles enunciated in the Ninth

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[6] Although typically the burden is on the employee to initiate the interactive process, courts have recognized that employees may proceed when their employers have essentially foreclosed the interactive process through their policies or actions because "[n]either party may create or destroy liability by causing a breakdown of the interactive process." *Albert v. Smith's Food & Drug Centers, Inc.*, 356 F.3d 1242, 1253 (10th Cir. 2004); accord *Davoll v. Webb*, 194 F.3d 1116, 1133 (10th Cir. 1999) (allowing employees to rely on the futile gesture doctrine where their employer's policy against transferring to Career Services positions foreclosed reassignment, the only reasonable accommodation that could have assisted plaintiffs); *Bultemeyer v. Fort Wayne Community Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (excusing mentally ill employee from requesting reasonable accommodation because "he may have thought it was futile to ask, after [his employer] told him he would not receive any more special treatment").

Circuit's decisions in *Heller* and *Brown v. Lucky Stores, Inc.*[7] permit the following analysis:

> To my mind, once the employer knows of, or should know of, a conflict, or the likelihood of a conflict, the employer is then obligated to interact with the job applicant about the likely conflict in order to determine if there is a reasonable accommodation for the job applicant's religious practices. At that point, the need for accommodation has been put on the table for discussion and the employer, with superior knowledge of its ability to accommodate, can no longer ignore the need to initiate dialogue with the employee regarding reasonable accommodations.

Abercrombie, 731 F.3d at 1149 (Ebel, J., concurring in part and dissenting in part).

II. Contrary to the Tenth Circuit's Holding, a More Flexible Notice Requirement Will Not Require Employers to Make Assumptions About Religion or Ask Applicants Prohibited Pre-Employment Questions about Religious Beliefs and Practices.

The Tenth Circuit justified its requirement that Elauf provide explicit, direct notice of a conflict

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[7] *Lucky Stores, Inc*, 246 F.3d 1182, 1188 (9th Cir. 2001) (recognizing an exception to the requirement that the employee request an accommodation in an ADA case where the employer knows that the employee has a disability, knows that the employee is having trouble at work due to his disability, and knows, or has reason to know, that the disability prevents the employee from requesting an accommodation).

between a religious practice and Abercrombie's Look Policy by noting that:

> [u]nder Title VII an employer is affirmatively discouraged from asking applicants or employees whether their seemingly conflicting practice is based on religious beliefs, and, if so, whether they actually will need an accommodation for the practice, because it is inflexible (i.e., truly conflicting), and the employer also is discouraged by the EEOC from speculating about such matters.

Abercrombie, 731 F.3d at 1134-35. Under those circumstances, the Tenth Circuit concluded "the interactive accommodation process ordinarily only can be triggered when applicants. first provide the requisite information to the employer." *Id.* at 1135. But the employer may and should ask certain questions when it knows there may be a conflict between an applicant's religious practice and the employer's policy.

There are several manners in which employers may lawfully inquire about the need for religious accommodations. Although the EEOC discourages employers from inquiring as to job applicants' religious beliefs as a general matter, after an employer has received sufficient information about an applicant's beliefs to be on notice of a potential religious conflict, the EEOC does not discourage employers from making limited inquiries to confirm the need for an accommodation. *See* Petitioner's Brief at 30 (citations omitted). To do so, an employer who suspects a possible religious conflict can simply advise an applicant of the relevant work rules and ask whether (and why) the applicant would have difficulty

complying. *Id.* (citing *EEOC's Best Practices for Eradicating Religious Discrimination in the Workplace*, available at http://www.eeoc.gov/policy/docs/best_practices_religion.html (last visited Dec. 2, 2014)). Therefore, concern about the prospect of routine inquiry into religious beliefs does not support limiting Title VII protections.

However, employers concerned about introducing the discussion of religious accommodation during the interview have the option of reserving the discussion for after a job offer is made. Title I of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12111 to 12117, shows that asking a question about whether a prospective applicant can meet dressing and grooming standards with or without a reasonable religious accommodation, in this case, would have been an acceptable inquiry, would have avoided the unlawful assumption that Abercrombie made,[8] and would have ultimately led to a post-job-offer discussion about whether the Look Policy posed a conflict to Elauf's sincerely held religious belief.[9]

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[8] The EEOC put forth evidence establishing that "Abercrombie assumed that Elauf was Muslim, that she wore a hijab for religious reasons, and that she would insist on wearing a hijab while working in an Abercrombie store, and then refused to hire Elauf because she wore a hijab." *Abercrombie*, 731 F.3d at 1150 (Ebel, J., concurring in part and dissenting in part).

[9] The Tenth Circuit's standard prevents inquiry into whether Abercrombie's Look Policy regarding caps is a legitimate job requirement and if so, whether an employee wearing a hijab, turban, or yarmulke for religious purposes could model Abercrombie's "classic East Coast collegiate" aesthetic with that addition to the "look."

Under Title VII, Title I of the ADA expressly prohibits a covered entity from making inquiries of job applicants about the existence, nature, or severity of a disability, employers may lawfully inquire into the ability of an applicant to perform job-related functions. *See* 42 U.S.C. §§ 12112(d)(2)(A)-(B). The EEOC's ADA regulations clarify that lawful pre-employment inquiries include asking applicants how they would perform job-related functions with or without reasonable accommodation. 29 C.F.R. § 1630.14(a). Further, the EEOC provides precise written guidance under the ADA on how to formulate inquiries regarding reasonable accommodation that can defer the discussion until after a job offer and be applied to religious accommodations:

> May an employer ask whether an applicant can perform the job?
>
> Yes. An employer may ask whether applicants can perform any or all job functions, including whether applicants can perform job functions "with or without reasonable accommodation."
>
> May an employer ask applicants whether they will need reasonable accommodation to perform the functions of the job? In general, an employer may not ask questions on an application or in an interview about whether an applicant will need reasonable accommodation for a job. This is because these questions are likely to elicit whether the applicant has a disability (generally, only people who have

> disabilities will need reasonable accommodations).
>
> Example: An employment application may not ask, "Do you need reasonable accommodation to perform this job?"
>
> Example: An employment application may not ask, "Can you do these functions with ___ without ___ reasonable accommodation? (Check One)"

EEOC No. 915.200, *ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations* (1995), available at http://www.eeoc.gov/policy/docs/preemp.html (last visited Dec. 2, 2014). Therefore, accommodation may be discussed during the interview when there is notice of a potential conflict or after a job offer and before the applicants begin employment.

The EEOC's Title VII regulations regarding religious discrimination are consistent with its regulations and guidance regarding ADA accommodations. An employer may not base its decision whether to hire an applicant on the applicant's need for a religious accommodation unless it can demonstrate that it cannot reasonably accommodate the applicant's religious practices without undue hardship. 29 C.F.R. § 1605.3(b)(1). In the closely analogous example, the EEOC clarifies that to determine a prospective employee's availability-for-work during the weekends, an employer is limited to inquiries that either do not have the effect of excluding

employees who need a religious accommodation or are justified by business necessity. *See* 29 C.F.R. § 1605.3(b)(2).

An example of a permissible practice is for the employer to state the normal work hours for the job and, after making it clear to the applicant that he or she is not required to indicate the need for any absences for religious practices during the scheduled work hours, ask the applicant whether he or she is otherwise available to work those hours. Then, after a position is offered, but before the applicant is hired, the employer can inquire into the need for a religious accommodation and determine whether an accommodation is possible. *Id.* The same practice can be used to address dress and grooming standards, such as those included in Abercrombie's Look Policy. The employer may provide a copy of the dress and grooming standards to the applicant and inquire whether a prospective applicant can meet dressing and grooming standards with or without a reasonable religious accommodation.

Thus, when Elauf appeared at the interview for a position at Abercrombie wearing a black hijab, the assistant manager who interviewed her could have provided her with a copy of the Look Policy[10] (or alternatively, could have described the Look Policy to

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[10] Employers are encouraged to share dress and grooming standards with applicants as one of several recommendations to prevent Title VII violations. *See, e.g., Dress Codes: Tips on Adopting and Enforcing Dress Policies*, Richards, Watson, and Gershon—Attorneys at Law Employment and Labor Newsletter, available at http://www.rwglaw.com/pdf/Dress Code.pdf (last visited Dec. 1, 2014).

her) and either asked (1) whether and why Elauf would have difficulty complying with the policy, or (2) whether Elauf could adhere to the Look Policy with or without a reasonable religious accommodation. If the latter approach was used, whether or not Elauf needed a reasonable accommodation for the hijab, her answer would have likely been "yes." Assuming Abercrombie's offer, Elauf could have asked for an exception to the Look Policy because she wore the hijab for religious reasons. If there were any questions as to whether to grant the reasonable accommodation request, the interviewer could have referred the question to the corporate office as Abercrombie stated is its policy.

Then, for those employers who prefer to keep religion out of the hiring discussion, whether a reasonable accommodation is lawfully required would be considered separate from the hiring process. Even if upon being asked whether she could meet the Look Policy, or if Elauf had volunteered that she wanted to wear her hijab to work for religious reasons, the EEOC's regulation contemplates that the issue of reasonable accommodation may arise during the hiring process without resulting in a violation.[11]

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[11] The EEOC Title VII religious discrimination regulation states that the "use of pre-selection inquiries which determine an applicant's availability has an exclusionary effect on employment opportunities of persons with certain religious practices" and therefore "the use of such inquiries will be considered to violate Title VII." *See* 29 C.F.R. § 1605.3(b)(2). However, the regulation also allows an employer to overcome the presumption of a violation under certain circumstances. 29 C.F.R. §§ 1605.3(b)(2)(i)-(ii) (allowing employer to disprove a violation by showing either that the inquiries (1) "did not have an exclusionary effect on its .

The Tenth Circuit states that applicants must provide explicit, direct notice of a reasonable accommodation request under Title VII because, in part, "an employer is not legally obligated under Title VII to prompt applicants to deliver notice of the need for a religious accommodation, by initially recounting a laundry list of all of the practices that employees cannot do in the workplace." *Abercrombie*, 731 F.3d at 1130 n.11. As a practical matter, a flexible rule, as enunciated in *Heller*, would not encumber employers by requiring that they review a laundry list of employment practices with every applicant because, in reality, notice of conflicts between sincerely held religious beliefs and workplace requirements do not often emerge until after employment begins. And the trigger for engaging in an interactive dialogue about reasonable accommodation is not initiated until a potential conflict exists. As the following list of religious accommodations reflects, most religious accommodations apply to employees rather than applicants:

- "tak[ing] into account the different religious beliefs of *employees* when planning holiday-related events,"[12]

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prospective employees needing an accommodation for the same religious practices" or (2) "w[ere] otherwise justified by business necessity").

[12] Society for Human Resource Management, *Survey Report—Religion and Corporate Culture: Accommodating Religious Diversity in the Workplace* (2008) at 7 (emphasis added), available at http://www.shrm.org/research/Surveyfindings/articles/pages/religionandcorporateculture.aspx (last visited Dec. 2, 2014) ("SHRM 2008 Survey Report").

- "allow[ing] religious decoration of [employee] workspace within one's office or cubicle,"[13]
- "allow[ing] flexible scheduling to accommodate *employees'* religious practices at work (e.g. meditating, praying, worshiping, etc.),"[14]
- "tak[ing] into account *employees'* various religious holidays when planning work-related events (e.g. conferences, meetings, trainings, trips, workshops, etc.),"[15]
- "offer[ing] variety of food in organization's cafeteria/eatery, meetings, etc. (e.g. halal, kosher, vegetarian, etc.),"[16]
- "mak[ing] dress code and/or personal appearance code exemptions/modifications,"[17]
- "creat[ing] designated areas for *employees* to use for religious practices (e.g. meditation room, prayer room, etc.),"[18]

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[13] *Id.*

[14] *Id.* (emphasis added).

[15] *Id.* (emphasis added).

[16] *Id.*; *see also* 29 C.F.R. § 1605.2, App. A (summarizing findings during the Commission's Hearing on Religious Discrimination about religious practices requiring accommodation and listing "following certain dietary restrictions").

[17] SHRM 2008 Survey Report, at 7; *see also* 29 C.F.R. § 1605.2, App. A (listing "dress and other personal grooming habits" as religious practices requiring accommodation).

[18] SHRM 2008 Survey Report, at 7 (emphasis added); *see also* 29 C.F.R. § 1605.2, App. A (listing "need for prayer break during work hours" as a religious practice requiring accommodation).

- "allow[ing] religious decoration of [employee] workspace (within one's office/cubicle) during religious holidays only,"[19]
- "allow[ing] on-site religion-based affinity groups,"[20]
- allowing sufficient leave for an employee during a mourning period for a deceased relative,[21]
- allowing an exemption to a medical examination requirement,[22]
- flexible scheduling for observance of Sabbath or religious holidays,[23] and
- excusing employees from performing duties that conflict with religious beliefs.[24]

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[19] SHRM 2008 Survey Report, at 7.

[20] *Id.*

[21] 29 C.F.R. § 1605.2, App. A (listing "not working during a mourning period for a deceased relative" as a religious practice requiring accommodation).

[22] *Id.* (listing "prohibition of medical examinations" as a religious practice requiring accommodation).

[23] *Id.* (listing "observance of the Sabbath or religious holidays" as religious practices requiring accommodation).

[24] *See, e.g., Noesen v. Med. Staffing Network, Inc.*, 2007 WL 1302118 (7th Cir. May 2, 2007) (pharmacy reasonably accommodated Catholic pharmacist by allowing him to transfer any customer service involving contraceptives and relieving him of all telephone and counter duties would have posed undue hardship).

Even dress and grooming standards and availability for work do not present required items on a laundry list of workplace rules that an employer must review with applicants, unless an employer intends to apply the requirements as a selection criterion without providing any notice to applicants that they are being evaluated on the basis of the criteria, as Abercrombie did in this case. Here, Abercrombie need only mention a single item—the Look Policy—not because it was on a laundry list of its job expectations for employees, but because it chose to apply the Look Policy's reference against "caps" and wearing black to reject Elauf, unbeknownst to her, and thereby deprive her of the opportunity to ask for a religious accommodation.

This stands in stark contrast to *Toledo*, where the employer communicated its policy to the applicant of not hiring applicants who had used illegal drugs in the two years prior to their application and informed him that he would be hired subject to passing several tests, including a polygraph test to evaluate the truthfulness of his responses related to past drug use. *Toledo*, 892 F.2d at 1484. This notice of the pre-selection tests and requirements prompted the applicant to initiate a dialogue about his membership in the Native American Church and use of peyote as part of church ceremonies. *Id.*

Similarly, an employer's notice to prospective applicants that they had been scheduled to take a required pre-employment test would prompt an applicant to engage in a dialogue with the employer if the date of the test fell on a religious holiday or Sabbath. *See* 29 C.F.R. § 1605.3(a) (requiring covered entities to reschedule a selection test when applicants

cannot attend because of their religious practices unless undue hardship would result).

In those limited circumstances when a conflict between a sincerely held religious belief and an employer's policy arises before a job offer and there has been a breakdown in the use of the interactive process to resolve the conflict, the rule in *Heller* is flexible enough to address whether the applicant or employer is responsible for that breakdown. Under *Heller's* flexible rule, courts are better equipped to reach appropriate results when different circumstances require, such as when an employer, as in *Toledo*, provides notice of a selection criterion to the applicant, versus an employer such as Abercrombie, which failed to inform Elauf of their Look Policy, but assumed that she was Muslim, wore the hijab for religious reasons, and did not select her because she wore the hijab to the job interview.

If the *Heller* rule is adopted, employers will be encouraged to participate in the interactive dialogue to resolve reasonable accommodation issues on the merits. Only then can unresolved disputes between applicants and employers be decided, not on the basis of asymmetry in information, but on whether there is a reasonable accommodation that does not require an applicant to choose between an employment opportunity and following a sincerely held religious belief without undue hardship to the employer.

CONCLUSION

This Court should reverse the Tenth Circuit's decision.

Respectfully submitted,

THOMAS C. HORNE
Attorney General of Arizona
Robert C. Ellman
Solicitor General
Rose A. Daly-Rooney*
Chris Carlsen
Assistant Attorneys General
400 W. Congress, Suite S-315
Tucson, AZ 85701
(520) 628-6756
Rose.Daly-Rooney@azag.gov
**Counsel of Record*

Counsel for Amici Curiae States

RUSSELL A. SUZUKI
Attorney General of Hawai'i
425 Queen Street
Honolulu, Hawai'i 96813
(808) 586-1500

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2464

DOUGLAS F. GANSLER
Attorney General
State of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

TIMOTHY C. FOX
Attorney General
Dale Schowengerdt
Solicitor General
State of Montana
P.O. Box 201401
Helena, MT 59620
(406)444-2026

JOSEPH A. FOSTER
Attorney General
State of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

ERIC T. SCHNEIDERMAN
Attorney General
State of New York
120 Broadway, 25th Floor
New York, NY 10271

ELLEN F ROSENBLUM
Attorney General
State of Oregon
1162 Court St. N.E.
Salem, OR 97301
(503)378-4400

ROBERT W. FERGUSON
Attorney General of Washington
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
(360)753-6200

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